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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JUAN JOSE DIAZ, Defendant and Appellant.	B205103 (Los Angeles County Super. Ct. No. PA059675)

APPEAL from a judgment of the Superior Court of Los Angeles County. Charles L. Peven, Judge. Affirmed.

Jeffrey Lewis, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Susan Sullivan Pithey and Allison H. Chung, Deputy Attorneys General, for Plaintiff and Respondent.

Juan Jose Diaz, also known as Juan Jose Figueroa, Juan Figueroa Diaz and Jose Figueroa, appeals from the judgment entered upon his conviction by jury of one count of second degree robbery (Pen. Code, § 211).[1] The trial court sentenced him to the midterm of three years in state prison. Appellant contends that the trial court erred in failing to instruct the jury on aiding and abetting.

We affirm.

FACTUAL BACKGROUND

On July 30, 2007, between 9:00 and 10:00 p.m., Tyler Zarka (Zarka) went to the Jolly Jug liquor store, located at Chase Street and Reseda Boulevard, in the Devonshire area. As he approached the store, appellant and codefendant, Gerardo Rios (Rios),[2] were sitting on the ground by a wall and begged him for money. Zarka said he "didn't have any" and proceeded into the store. On other occasions, he had given them money when they begged, or purchased beer for them and drank with them.

When Zarka exited the store, he crossed the street, trying to avoid appellant and Rios. Appellant called to him, but Zarka ignored him. Appellant crossed the street and stopped in front of Zarka. He kept asking for money, and Zarka kept repeating "No," and trying to walk away. Appellant continued following him and called Rios, who joined them, holding onto a bicycle with one hand and a Samurai sword in the other. Both men were asking for money. Zarka was nervous.

Appellant and Rios followed Zarka and, at some point, grabbed him with "a strong grip" and tried to take him into an alley. Zarka was "fighting them off" in an unsuccessful effort to free himself. In the alley, appellant attempted to get into Zarka's right front pants pocket, but Zarka covered it with his arm. Rios placed his hand in

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1 All further statutory references are to the Penal Code unless otherwise indicated.

2 Codefendant Rios is not a party to this appeal. He was found guilty by the jury of second degree robbery with the special allegation that he personally used a deadly weapon in the commission of the offense (§ 12022, subd. (b)(1)).

Zarka's left front pocket and removed a bus pass and identification card. Zarka yelled for Rios to return the property, and Rios told him to "back off." Zarka fought with Rios in an effort to get back his property. Rios removed the Samurai sword from its sheath and pointed the tip seven inches from Zarka's stomach/chest area. Rios re-sheathed the sword and began walking away. Zarka went after Rios, yelling at him. Appellant grabbed Zarka's arms from behind to stop him. Appellant and Rios then walked away, with Zarka following. Rios disposed of the sword. Shortly thereafter a patrol car arrived.

Nia Bluitt (Bluitt) was in her car on Reseda Boulevard and witnessed the altercation. She saw a person point a Samurai sword at the neck of another person with long hair, yank the person's long hair, and hold the person's neck in an arm-hold, while jabbing the sword toward the person's face. Someone "going by" on a bicycle was either trying to stop or calm the man with the sword, or help the swordsman, she was unsure which. She then saw the man with the sword push the man with long hair into the alley. The man with the bicycle appeared to calm the man with the sword and stop the attack. But the man with the sword laughed and renewed his attack. Because of his laugh, Bluitt was uncertain if they were serious or playing. She never saw the person on the bike make any move toward Zarka. Bluitt called 911 and told the operator that a man and his "girlfriend" were arguing and that the man was going to kill her. She said that the man had a sword. When Bluitt returned to the alley at the 911 operator's request, she realized that the long haired person was a man. She called 911 again to correct her prior statement that the person was a girl. She also saw a person in the alley who looked like a security guard.

Los Angeles Police Department Officer Osmani Baeza responded to the call. He saw two males leaving the alley near where Bluitt had witnessed the attack, one matching the description he had been given. He detained appellant and Rios and recovered a Samurai sword from the alley. He unsuccessfully looked for the items Zarka had said were taken from him. Three days after the incident, Zarka returned to the alley and found his bus pass and identification. Zarka told the officer that Rios held the sword to him when he demanded the money.

DISCUSSION

Appellant's sole contention is that the trial court prejudicially erred in failing to instruct the jury sua sponte on aiding and abetting in accordance with CALCRIM Nos. 400[3] and 401.[4] He argues that the failure to instruct on aiding and abetting "is the functional equivalent of a failure to instruct on an element of the crime. . . . [¶] . . . [¶]

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[3] CALCRIM No. 400 states: "A person may be guilty of a crime in two ways. One, he or she may have directly committed the crime. I will call that person the perpetrator. Two, he or she may have aided and abetted a perpetrator, who directly committed the crime. A person is equally guilty of the crime whether he or she committed it personally or aided and abetted the perpetrator who committed it. [¶] [Under some specific circumstances, if the evidence establishes aiding and abetting of one crime, a person may also be found guilty of other crimes that occurred during the commission of the first crime.]"

[4] CALCRIM No. 401 states: "To prove that the defendant is guilty of a crime based on aiding and abetting that crime, the People must prove that: [¶] 1. The perpetrator committed the crime; [¶] 2. The defendant knew that the perpetrator intended to commit the crime; [¶] 3. Before or during the commission of the crime, the defendant intended to aid and abet the perpetrator in committing the crime; AND [¶] 4. The defendant's words or conduct did in fact aid and abet the perpetrator's commission of the crime. [¶] Someone *aids and abets* a crime if he or she knows of the perpetrator's unlawful purpose and he or she specifically intends to, and does in fact, aid, facilitate, promote, encourage, or instigate the perpetrator's commission of that crime. [¶] If all of these requirements are proved, the defendant does not need to actually have been present when the crime was committed to be guilty as an aider and abettor. [¶] [If you conclude that defendant was present at the scene of the crime or failed to prevent the crime, you may consider that fact in determining whether the defendant was an aider and abettor. However, the fact that a person is present at the scene of a crime or fails to prevent the crime does not, by itself, make him or her an aider and abettor.] [¶] [A person who aids and abets a crime is not guilty of that crime if he or she withdraws before the crime is committed. To withdraw, a person must do two things: [¶] 1. He or she must notify everyone else he or she knows is involved in the commission of the crime that he or she is no longer participating. The notification must be made early enough to prevent the commission of the crime. AND [¶] 2. He or she must do everything reasonably within his or her power to prevent the crime from being committed. He or she does not have to actually prevent the crime. [¶] The People have the burden of proving beyond a reasonable doubt that the defendant did not withdraw. If the People have not met this burden, you may not find the defendant guilty under an aiding and abetting theory.]"

The jury was given no opportunity to make any factual findings about whether appellant intended to commit, encourage or facilitate a robbery." The Attorney General agrees that the trial court should have instructed on aiding and abetting but contends that any error was harmless beyond a reasonable doubt. We agree with the Attorney General.

I. Failure to Instruct on Aiding and Abetting

In criminal cases, "'"even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. [Citations.] The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case."'" (*People v. Breverman* (1998) 19 Cal.4th 142, 154.) The trial court has a duty to instruct sua sponte only if "'there is substantial evidence supportive of such a defense *and* the defense is not inconsistent with the defendant's theory of the case.' [Citation.]" (*Id.* at p. 157.)

Robbery is the "'felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear.'" (*People v. Tafoya* (2007) 42 Cal.4th 147, 170.) While there is evidence here that appellant participated in the robbery of Zarka, there is no evidence that he took personal property from him. Consequently, appellant could not be found guilty of robbery as the perpetrator. (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 89 [for conviction of an offense to be supported by sufficient evidence, there must be "substantial evidence of the existence of every element of the offense charged"].) But under the facts, appellant could still be guilty of robbery as an aider and abettor if he by act or advice, aids, promotes or encourages the commission of a crime with knowledge of the criminal purpose of the perpetrator and with the intent to commit, encourage or facilitate the commission of the offense. (*People v Beeman* (1984) 35 Cal.3d 547, 561.). There was substantial evidence to support this theory. Appellant kept asking Zarka for money, followed him as Zarka tried to walk, grabbed Zarka and tried to take him into the alley, called to Rios to join him, tried to take the contents of Zarka's front right pants pocket, as Rios was reaching into Zarka's left pocket, held Zarka's arms behind him

when Zarka tried to go after Rios to get his property back, and left with Rios after Rios had taken Zarka's bus pass and identification. In light of this evidence, and the lack of evidence that appellant had taken any property, the trial court was required to instruct sua sponte on aiding and abetting.[5] Its failure to do so was error.

II. Harmless Error

Our Supreme Court has indicated that under the federal Constitution, "instructional errors—whether misdescriptions, omissions, or presumptions—as a general matter fall within the broad category of trial errors subject to *Chapman* [*Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*)] review on direct appeal." (*People v. Flood* (1998) 18 Cal.4th 470, 499.) "[T]he harmless-error inquiry [under *Chapman* is as follows]: Is it clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error?' (*Neder* [*v. United States* (1999)] 527 U.S. [1,] 18.)" (*People v. Cox* (2000) 23 Cal.4th 665, 677, fn. 6.) Errors under the California Constitution are subject to review under the *Watson* (*People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*)) standard. (*People v. Flood, supra,* at p. 490.) We conclude that, even under the more stringent *Chapman* standard, the error here was harmless.

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[5] We disagree with *People v. Cook* (1998) 61 Cal.App.4th 1364 (*Cook*) which concluded that, "[O]ne who engages in conduct that is an element of the charged crime is a perpetrator, not an aider and abettor, of the completed crime . . . . If the defendant performed an element of the offense, the jury need not be instructed on aiding and abetting, even if an accomplice performed other acts that completed the crime." (*Id*. at p. 1371.) As the federal district court explained in ruling on defendant Cook's petition for writ of habeas corpus, "Petitioner correctly argues that the rule expressed in *Cook* is unconstitutional. Due process requires that all elements of the offense be proven against the defendant. However, the *Cook* rule allows the prosecution to prove an offense by establishing only one element as to a particular defendant, effectively removing the necessity of proving all required elements and thereby lessening the burden of proof. Pursuant to the *Cook* rule, if a crime is completed, then the prosecution need only prove that a defendant committed one element in order for the defendant to be found guilty of the entire crime, so long as another actor committed the remaining elements." (*Cook v. Lamarque* (E.D.Cal. 2002) 239 F.Supp.2d 985, 996.)

"A person aids and abets the commission of a crime when he or she, (i) with knowledge of the unlawful purpose of the perpetrator, (ii) and with the intent or purpose of committing, facilitating or encouraging the commission of the crime, (iii) by act or advice, aids, promotes, encourages or instigates the commission of the crime." (*People v. Cooper* (1991) 53 Cal.3d 1158, 1164.) There was overwhelming evidence here that appellant knew of Rios's unlawful purpose, intended to rob Zarka or facilitate his robbery and aided or instigated the crime. In fact, appellant was not only aware of Rios's intention to take Zarka's property, but had the same intention and initiated the robbery, working in conjunction with Rios. According to Zarka, when he left the liquor store, he sought to avoid appellant and Rios. It was appellant who initially called him, followed him and whistled for Rios to join them, at all times repeatedly asking Zarka for money. When they got near the alley, appellant and Rios grabbed Zarka, pushed him toward the alley, and, once inside, attempted to force their way into his pockets to take the contents. After Rios took the bus pass and Zarka's identification, when Zarka went after him to retrieve it, appellant held him back by grabbing his arms and holding them behind him. By that action alone he facilitated the robbery, knowing it was a robbery, as Rios had already taken Zarka's property. (*People v. Gomez* (2008) 43 Cal.4th 249, 256, fn. 5 ["'robbery is said to continue through the escape to a place of temporary safety'"].) But for the fact that Zarka was able to block appellant from getting into his right pants pocket, appellant, like Rios, would have also taken property. These facts compellingly establish that appellant knew Rios was going to rob Zarka, that appellant intended to do so and, in fact, did acts which facilitated the robbery.

It is unlikely beyond a reasonable doubt that the jury would not have found otherwise. It was instructed on robbery in accordance with CALCRIM No. 1600, which included the requirement that, at the time of the use of force or fear, the defendant must have formed the intent to take the property. Having found appellant guilty of robbery, the jury must have found that he had the intent to rob. Moreover, it likely adopted Zarka's version of events despite its conflict, in part, with Bluitt's testimony. Most significantly, she testified that the person without the sword appeared to be helping the

victim and trying to calm the sword wheeling person. However, she was in a car going by the scene of the altercation, viewed the scene for only seconds, incorrectly thought that the victim was a woman, and believed she saw a security guard at the scene, who was not seen by Zarka or the police when they arrived. Additionally, she also testified that she really could not tell if the person without the sword was helping the victim or the man with the sword. The jury, by finding appellant guilty, apparently believed Zarka's version of events. Moreover, it deliberated for less than two hours, indicating that this was not a close case. (*People v. Bordelon* (2008) 162 Cal.App.4th 1311, 1329, fn. 3 ["the brief period of jury deliberation shows that the case was not a close one from the jury's point of view"].)

DISPOSITION

The judgment is affirmed.

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_____, J.

ASHMANN-GERST

We concur:

_____, P. J

BOREN

_____, J.

CHAVEZ